Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-985

BRUCE GEISINGER

Petitioner

v.

BOARD OF COUNTY COMMISSIONERS
OF MIAMI COUNTY, OHIO,
BOARD OF ELECTIONS
OF MIAMI COUNTY, OHIO,
DALE DAVIS, TREASURER
OF MIAMI COUNTY, OHIO,
JERRY L. BROWN, AUDITOR
OF MIAMI COUNTY, OHIO,
TED W. BROWN, SECRETARY
OF STATE OF OHIO, and
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, BRUCE GEISINGER, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Ohio rendered in these proceedings on November 9, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, reported at 52 Ohio St. 2d 51, appears at Appendix A, infra, pp. 11-20. The opinion of the Court of Appeals of Miami County, Ohio, is unreported, and appears at Appendix B, infra, pp. 21-29. The opinion of the Common Pleas Court of Miami County, Ohio, is unreported, and appears at Appendix C, infra, pp. 30-36.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on November 9, 1977. See Appendix A, p. 11, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The General Assembly of Ohio enacted a statute effectuating certain changes in the Municipal Court previously established in the City of Troy, abolishing the office of the incumbent full-time judge of that court during his term, and providing for the election of a successor judge to serve the unexpired portion of his term. The question thereby arising is:

> Whether the judgment of the Supreme Court of Ohio in affirming the lower court decisions and thus permitting the legislative removal of the petitioner from his judicial office, without a hearing of any kind, and in direct contravention of the provisions of the Ohio Constitution, is consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, Section 15, Ohio Constitution:

> "Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided."

Article IV, Section 17, Ohio Constitution:

> "Judges may be removed from office, by concurrent resolution of both houses of the general assembly, if two-thirds of the members elected to each house, concur therein; but, no such removal shall be made, except upon complaint, the substance of which shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard."

Article II, Section 38, Ohio Constitution:

> "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

Article IV, Section 6, Ohio Constitution:

> "The judges of the supreme court, court of appeals, court of common pleas, and visions thereof,

and of all courts of record established by law, shall at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in summary fashion.

The petitioner, Bruce Geisinger, is the duly elected, qualified and acting Judge of the Municipal Court of the City of Troy, Ohio, having been elected for a full term of six years commencing January 1, 1974.

The General Assembly of Ohio thereafter enacted, and on August 19, 1975, the Governor approved, Sub. H. B. 205, which amends certain enumerated sections of the Revised Code of Ohio relating to municipal courts and judgeships, the abolition of police courts and other related matters.

More specifically, the enactment provides, inter alia, for the changing of the name and style of the Troy Municipal Court to the "Miami County Municipal Court"; for the expansion of the territorial jurisdiction of that court to include all of Miami County; for the election, in 1975, of two full-time judges for said court (which has now been accomplished); and for the abolition of the office of the existing full-time municipal judge of that court, during his term and effective upon the commencement of the terms of office of the full-time municipal judges elected in 1975. It should be noted that the term provided for the second of such judges precisely coincides with the unexpired term of the deposed petitioner.

The petitioner initially sought a writ of prohibition

in the Supreme Court of Ohio to prevent the election of a new judge to complete the unexpired portion of his term; that action was summarily dismissed.

Thereupon the petitioner brought an action in the Common Pleas Court of Miami County, Ohio, seeking a declaratory judgment that:

1. Those portions of Sub. H. B. 205 which abolish his office and provide for the election of a successor to serve out his unexpired term are unconstitutional and void.
2. That he is entitled to continue in office as judge of said court until the expiration of the term for which he was elected.

The matter was tried to the court on stipulation of facts and briefs of counsel. The trial court found the issues against petitioner and entered judgment on May 25, 1976. The Court of Appeals for Miami County affirmed the decision of the trial court by opinion filed September 28, 1976, and the Supreme Court of Ohio affirmed by its Decision and Order filed November 9, 1977.

Although petitioner asserted the matters of due process and equal protection in his initial complaint and thereafter repeated and argued such claims in each of the courts below, those courts have consistently failed and refused to pass, or even comment, on those questions; implicit, however, in the decisions of the Ohio Courts, is the substantive rejection of those constitutional claims and a determination that petitioner is not entitled to the protections vouchsafed by the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

1. *The decision below directly conflicts with the due process principles enunciated by this Court's Goss ruling.*

In *Goss v. Lopez* (1975), 419 U.S. 565, 42 L.Ed. 2d 725, 95 S.Ct. 729, this Court held that a state employee, who under state law has a legitimate claim of entitlement to continued employment, absent sufficient cause for discharge, may demand the procedural protections of due process. That ruling crystallized and placed in perspective the earlier pronouncements of this Court in *Board of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701, and *Perry v. Sindermann* (1972), 408 U.S. 593, 33 L.Ed. 2d 570, 92 S.Ct. 2694.

Examination of the circumstances under which the petitioner Bruce Geisinger held his public office, or employment, demonstrates them to be clearly within the *Goss* fabric. Petitioner was elected to an office created by an Ohio statute for a six-year term prescribed by the same statute (Ohio Revised Code, Chapter 19). He was assured by the provisions of Article IV, Section 15 of the Ohio Constitution that his office would not be vacated by the vagaries of the legislature, and he was further assured by the provisions of Article IV, Section 17 and Article II, Section 38 of the Ohio Constitution that he would not be removed from such office except for cause and upon complaint and hearing. Still further in this vein, the petitioner was assured by the provisions of Article IV, Section 6, Ohio Constitution, that his compensation would not be reduced during his term.

In view of these formidable assurances afforded him by the statute and organic law of the State of Ohio, it cannot be gainsaid that the petitioner has a protected property interest in his employment. He clearly has that legitimate claim of entitlement to continued employment absent sufficient cause for discharge which,

under the *Goss* principles, confers upon him the right to demand the procedural protections of due process.

This petition presents a deprivation of that property interest even more compelling that *Goss, Roth, Sindermann* or *Slochower* (*Slochower v. Board of Higher Education* (1956), 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637); we have here no charge of misconduct or other sufficient cause. There has been no complaint, no notice and no hearing of any kind; neither do we have a removal accomplished in any other manner allowed or provided by law. There exists here no minimal trace of due process.

What this petition does present is a removal from office by virtue of the legislative process; the rub, however, is that the Ohio constitutional strictures and interdictions, upon which the petitioner was entitled to rely, have been wholly ignored. The Ohio General Assembly has, arbitrarily, capriciously and totally without cause, abolished the office of the incumbent petitioner, and has then compounded its perfidy by mandating an election to choose a successor to complete the unexpired portion of his term. It is a fundamental principle of the law that an act forbidden by direction cannot be accomplished by indirection. For the General Assembly of Ohio to remove and replace the petitioner in such a manner, without complaint and hearing and in blatant disregard of his constitutional protections, constitutes a clear deprivation of petitioner's property interest and is constitutionally untenable.

If the legislative removal of the petitioner had occurred as an unfortunate, but necessary incident of a remedial enactment, the case for H. B. 205 might be stronger; but such is not the case. The offending provision of that enactment is the more nefarious in that

no legitimate legislative purpose is served by the removal and replacement of the petitioner.

That the deprivation of petitioner's property interest in his employment occurred at the hands of the Ohio General Assembly and the Ohio Supreme Court is not a defense; both are organs of that state, and it is to the states that the interdictions of the Fourteenth Amendment are directed:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures. . ."
> *Goss v. Lopez*, supra.
> *West Virginia Board of Education v. Barnette* (1943), 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178

2. *The decision below cannot be reconciled with the equal protection principles enunciated by this Court's ruling in Louisville Gas & Electric Co. v. Coleman (1927).*

In *Louisville Gas & Electric Co. v. Coleman* (1927), 277 U.S. 32, 72 L.Ed. 770, 48 S.Ct. 423, this Court set forth, in summary form, the established rules for testing a claimed discrimination, and added thereto the caution that "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

That final caution invites careful consideration of H. B. 205. While the number of full-time municipal courts existing within the State of Ohio is legion, that enactment abolished the office of only one, that of the petitioner. That fact, coupled with the considerations that the removal of the petitioner from his office bore no relationship with the avowed purpose of the act and served no other legitimate legislative purpose,

strongly suggests the enactment to be constitutionally discriminatory.

While it may be conceded that the legislature may make laws which are applicable on a differential basis, it is clear that such differentiation must bear a reasonable relationship to the purpose to be accomplished. The denial to the petitioner of the equal protection of the laws consists of the unnecessary and capricious discrimination between him and the myriad other full-time municipal judges of Ohio whose tenures were unaffected by H. B. 205 or by any other contemporary enactment. This particular discrimination is, in fact, antithetical to the objects of the act; having provided for the removal of the petitioner, the General Assembly then had to provide for the election of a substitute. For that reason, the petitioner, who thereby became the single member of a closed class, has been excluded from the protection of the law.

Viewed from the standpoint that the Ohio General Assembly, in effecting the legislative removal of the petitioner in contravention of state constitutional strictures, the classification is invidious in the ultimate degree.

The reasoning of the District Court for the Southern District of Texas in *Moore v. Harris County Commissioners Court* (1974), 378 F. Supp. 1006 (reversed on other grounds at 420 U.S. 77, 43 L.Ed. 2d 32, 95 S.Ct. 870) is pertinent and persuasive:

> Insofar as Art. 2351½ operates to truncate the term of a duly elected public official upon the circumstance that a mere convenience redistricting places him in a district with others, it invidiously and irrationally discriminates between him and others not so affected and between the effect of the votes of those who voted or were entitled to

vote in his election and voters whose franchise was not so bobbed. No compelling interest was here served by such discrimination. Certainly it was not necessary to effect redistricting in mid-term, or, if that were thought pressing, it was not compelling that the office be declared vacant as a result.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A

OPINION OF SUPREME COURT OF OHIO

GEISINGER, APPELLANT, V.
COOK ET AL., APPELLEES.

[Cite as Geisinger v. Cook (1977), 52 Ohio St. 2d 51.]

General Assembly — Abolition of statutory courts — Power to abolish office of municipal judge—Constitutionality.

Section 15 of Article IV of the Constitution of Ohio does not limit the power of the General Assembly to abolish municipal courts.

(No. 76-1276—Decided November 9, 1977.)

Appeal from the Court of Appeals for Miami County.

Bruce Geisinger, appellant herein, was the duly elected, qualified, and acting judge of the Troy Municipal Court, having been elected for a full term of six years commencing January 1, 1974. The following year, the General Assembly enacted Am. Sub. H. B. No. 205, and certain sections of the Revised Code relating to municipal courts were amended. A court to be known as the Miami County Municipal Court was created. Its territorial jurisdiction included the municipality of Troy. On November 4, 1975, the Miami County Board of Elections, appellee herein, caused the election of two judges to the new court, as provided in Am. Sub. H. B. No. 205.

On August 21, 1975, appellant filed a complaint in this court (case No. 75-771) for a writ of prohibition against the Board of Elections, Attorney General William J. Brown, and Secretary of State Ted W. Brown, appellees herein, in which action appellant prayed for

a writ restraining the respondents from causing the election of the two full-time judges, and from divesting appellant of his office. This court dismissed appellant's complaint.

Appellant then brought an action in the Court of Common Pleas of Miami County, seeking, *inter alia*, a declaratory judgment that those portions of Am. Sub. H. B. No. 205, which effected the abolition of his office and provided for the election of new judges, were unconstitutional and void, and that appellant was entitled to continue in office as judge of the Troy Municipal Court until the expiration of the term to which he had been elected.

On May 25, 1976, the Court of Common Pleas denied appellant's claims. Upon appeal to the Court of Appeals, the judgment of the trial court was affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Faust, Harrelson, Fulker & McCarthy and *Mr. John E. Fulker*, for appellant.

Mr. L. Craig Hallows, prosecuting attorney, for appellee Miami County Board of Elections.

Mr. William J. Brown, attorney general, and *Mr. Thomas V. Martin*, for appellees Ted W. Brown and William J. Brown

HERBERT, J. Appellant submits as his primary proposition of law that although the Constitution of Ohio empowers the General Assembly "to establish other courts" than constitutional courts, such power may not be exercised in a manner causing the vacation of the office of any judge.

Section 15 of Article IV of the Constitution of Ohio provides:

"Laws may be passed to increase or diminish the

number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided."

The foregoing has been the language of Section 15 since its amendment in 1912. Section 15 of Article IV originally provided:

"The general assembly may increase, or diminish, the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition, or diminution, shall vacate the office of any judge." This earlier wording of Section 15 was interpreted by this court in *State, ex rel. Flinn*, v. *Wright* (1857), 7 Ohio St. 333.

In *Flinn*, the relator had been duly elected and commissioned as a judge of the Criminal Court of Hamilton County, which court had been created by an act of the General Assembly. During relator's term of office, the General Assembly repealed the act creating his court of criminal jurisdiction, transferring its business to the Court of Common Pleas of Hamilton County.

The relator claimed that the repealing act, insofar as it attempted to abolish his office prior to the expiration of the period for which he had been elected and commissioned, was contrary to the Ohio Constitution

and hence inoperative, and that his office continued to exist notwithstanding the repealing act. The sole constitutional provision relied upon by the relator in this regard was Section 15 of Article IV, as it read in 1857.

In *Flinn*, this court declared that the saving clause at the end of Section 15, which applied to courts and judgeships established by the Constitution, did not apply to municipal courts and municipal judgeships created by the General Assembly:

"The relator * * * contends that the saving clause at the end of this section applies as well to courts and judges established and created by legislative authority, as to those which subsist independently of that authority. But we do not think so. 'But no *such* change, addition, or diminution, shall vacate the office of any judge.' The word 'such,' in connection with the words 'change, addition, or diminution,' directly refers us to certain changes, additions, and diminutions before mentioned and provided for. What are they? Clearly 'the number of the judges of the Supreme Court, the number of the districts of the court of common pleas, the number of judges of any district,' the districts themselves, 'or the subdivisions thereof.' The changes, additions, and diminutions mentioned in the preceding part of the section, evidently have no reference whatever to the 'other courts' which the general assembly may 'establish,' 'whenever two-thirds of the members elected to each house shall concur therein.'" *Flinn*, *supra*, at pages 335-36.

The effect of this court's conclusion was that Section 15 forbade the General Assembly to directly or indirectly vacate the office of a judge of a court established by the Constitution, but did not restrict the power of that branch of government to abolish municipal courts. The framers of the Ohio Constitution

intended to leave the power to abolish as full and unrestricted as was the power to create.

The probable motive underlying the 1912 amendment of Article IV was to guarantee to each county at least one common pleas court judge.[1] This was the focus of the spirited April 24, 1912, Constitutional Convention discussion of Proposal No. 304, which encompassed the amendment of Section 15 of Article IV to read as it does today. 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912), at pages 1397-1403.

Since 1912, Section 15 has directed that "no such change, addition, or diminution shall vacate the office of any judge." The word "such," relative to the phrase "change, addition, or diminution," guides us to changes, additions, or diminutions theretofore mentioned. This reference is to the number of the judges of the

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[1] Note this partial response of Mr. Halfhill to a question offered in the course of debate by Mr. Mauck:

"We started out with the assumption that we could not get along without a common pleas court in each and every county. I think that is evident. That is to say, we must hold a court in each county to settle personal disputes and differences and define and protect property rights, because that is a part of our civilization. We must maintain a court in each and every county, but in holding that court we are at the same time at a disadvantage, because we do not have a judge in each and every county; so we thought we could make the central proposal with two objects in view or possibly more.

"2. We would wipe out these awkward judicial districts, which ought never to have been in the constitution, by saying the county shall be the unit, the judge shall be elected within the county, the judge shall reside within the county and each county shall have a judge. So we have accomplished that much." 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912), at page 1399.

Supreme Court and the number of the judges of the common pleas courts in any county. The changes, additions, and diminutions do not relate to "other courts" which the General Assembly may see fit to establish.

We believe that the basic reasoning of *Flinn*, relative to Section 15, remains tenable.[2] Section 15 of Article IV of the Constitution of Ohio does not limit the power of the General Assembly to abolish municipal courts.

Appellant submits further that although Am. Sub. H. B. No. 205 provided for a change in the name and style of the Troy Municipal Court, for the expansion of the territorial jurisdiction formerly enjoyed by said court, and for the election of two new full-time judges, it did not abolish the Troy Municipal Court. He points out that R. C. 1901.01[3] establishes a municipal court in various municipalities, among them the municipal corporation of Troy, and that the amended statutory provision, retaining Troy, omits Piqua, which also is located in Miami County, from the list of enumerated municipal corporations.

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[2] Consistent with our holding in the instant cause is *State, ex rel. Gustafson*, v. *Krause* (1936), 131 Ohio St. 97, 1 N. E. 2d 937, upon which appellant heavily relies. The *Gustafson* relator had instituted an action in the appellate court to obtain a peremptory writ of mandamus to compel the respondent board of elections to place his name on the ballot in a primary election; the relator desired to become a candidate for the Court of Common Pleas. *Gustafson*, which did not mention *Flinn*, *supra* (7 Ohio St. 333), therefore entailed a judgeship in a Court of Common Pleas, a court established by the Constitution.

[3] R. C. 1901.01 provides, in relevant part:

"There is hereby established a municipal court in each of the following municipal corporations:

"Akron, * * * Troy, * * * Youngstown, and Zanesville."

Section 10 of Am. Sub. H. B. No. 205 provides:

"The offices of the existing full-time municipal judge of the Troy municipal court, and the existing part-time Fremont municipal court are abolished by this act, effective upon the commencement of the term of office of the full-time municipal judges who are elected respectively to the Miami County and Fremont municipal courts."

Section 11 of Am. Sub. H. B. No. 205 provides in relevant part:

"All causes, judgments, executions, and other proceedings pending in the municipal courts of Piqua and Troy at the close of business December 31, 1975, shall be transferred to and proceed in the Miami County municipal court as if originally instituted there."

There does remain a municipal court in Troy, as appellant asserts. However, it is not the Troy Municipal Court, but the Miami County Municipal Court. Through its enactment of Am. Sub. H. B. No. 205, the General Assembly abolished the Troy Municipal Court and created the Miami County Municipal Court, which shall sit in Troy and have county-wide jurisdiction. See, also, R. C. 1901.121.

Appellant avers that the General Assembly may not remove a judge from office except as provided in Section 17 of Article IV of the Constitution of Ohio.[4] He

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[4] Section 17 of Article IV of the Constitution of Ohio provides:

"Judges may be removed from office, by concurrent resolution of both Houses of the General Assembly, if two-thirds of the members, elected to each House, concur therein; but, no such removal shall be made, except upon complaint, the substance of which shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard."

states that he has been removed from his judicial office by a legislative act of the General Assembly, and submits that a legislative enactment effecting such a removal in a fashion other than that provided in Article IV is unconstitutional and void.

It is our conclusion that the constitutional provisions for removal of a judge from office have no application under the instant facts. If the court is properly abolished by the General Assembly, the term of one holding the office of judge of that court is terminated. This court has cited *Flinn* in noting that "there can be no incumbent without an office." *State, ex rel. Attorney General*, v. *Jennings* (1898), 57 Ohio St. 415, 423, 49 N. E. 404.

Appellant contends further that during the term for which he was elected, he was legislatively removed from his judgeship in violation of Section 6 of Article IV of the Constitution of Ohio,[5] relating to judicial salaries. We agree that as long as a court remains in existence, the salary of a judge thereof cannot be reduced during his term of office. However, the court upon which appellant served no longer exists; it was properly abolished by the General Assembly.

The judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

O'NEILL, C. J., CELEBREZZE, P. BROWN and SWEENEY, JJ., concur.

W. BROWN, J., concurs in the syllabus and judgment.

LOCHER, J., dissents.

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[5] Section 6(B) of Article IV of the Constitution of Ohio provides, in pertinent part:

WILLIAM B. BROWN, J., concurring. I concur in the syllabus and in the judgment of Justice Herbert concerning the power of the General Assembly.

However, I feel strongly that Judge Geisinger should be paid his salary for the balance of his term. If it is not a legal obligation, it is certainly a moral obligation of the General Assembly to make sure that he is reimbursed for the balance of his elected term.

LOCHER, J., dissenting. Section 15 of Article IV of the Ohio Constitution can only be read as prohibiting the vacation of the office of any judge during his term. Thus, I am unable to assent to the majority's bestowal of unbridled power upon the General Assembly to abolish courts and judgeships during the term of the incumbent. Nor, do I find the basic reasoning of *State, ex rel. Flinn*, v. *Wright* (1857), 7 Ohio St. 333, relative to Section 15 either applicable or tenable. The Court of Appeals, in the instant cause, made the following cogent comment concerning *State, ex rel. Flinn*, v. *Wright, supra*, at page six of its opinion:

"The rationale of the *Flinn* case has not been reversed, even though its logic is questionable and its conclusion open to expressed doubts. Rhetorically, the application of the words, 'no such change, addition or dimunition,' to some but not all of the preceding conditions appears to be one of personal choice not supported by either the rules of grammar or by the purpose of the entire section."

Justification for the continuation of the limited ap-

"The judges of the Supreme Court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office."

plication espoused in *State, ex rel. Flinn*, v. *Wright, supra*, is further strained because the "preceding conditions" are now joined in the conjunctive, instead of the disjunctive that existed in *State, ex rel. Flinn*, v. *Wright, supra.*

This strained interpretation not only rebukes the plain intent of the section predicated upon a commonsenical heritage of judicial independence, but fails to heed the sound admonition:

"Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws." Bacon, Essays of Judicature 12.

The results are indeed torturous. The General Assembly no longer is restricted in the removal of certain of this state's judges to the prescribed manner of Section 17 of Article IV of the Ohio Constitution. A convenient circumvention, vitiating the necessity of a complaint, hearing and two-thirds vote of the members of each house, is provided for the General Assembly to partially disenfranchise the voters by the removal of a duly elected member of the judiciary.

The judiciary is commonly characterized as the least equal of the three equal branches of government, possessing neither the purse nor the sword. Historically, the judicial branch has been protected from the possibility of importuning by the other branches of government. The majority's decision needlessly weakens one vital safeguard. I can find neither an express constitutional mandate for this action abhorrent to the basic fabric of government nor any utilitarian necessity. There are numerous means of effecting judicial reorganization to meet the demands of population and efficiency not necessitating the removal of a judge during his elected term, the disenfranchisement of electors, and latent legislative subjection of the judiciary.

Accordingly, I respectfully dissent.

APPENDIX B

OPINION OF COURT OF APPEALS OF MIAMI COUNTY, OHIO

IN THE COURT OF APPEALS
OF MIAMI COUNTY, OHIO

BRUCE GEISINGER
Plaintiff-Appellant

vs.

KENNETH COOK, et al.
Defendants-Appellees

Case No. 76 CA 25

OPINION

Rendered on the 28th day of September, 1976.

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Attorneys for Defendants-Appellees

McBRIDE, J.

This appeal is from a declaratory judgment of the Court of Common Pleas of Miami County which affirmed as constitutional those provisions of Amended Substitute House Bill 205, enacted in 1975, which abolished the office of the incumbent judge of the Troy Municipal Court *during his term.*

The incumbent judge initially sought a writ of prohibition in the Supreme Court of Ohio to prevent the election of judges to the new county wide court of Miami County. This relief was summarily denied. The two judges were subsequently elected, one for a period of time similar to the unexpired term of the incumbent judge of the Troy Municipal Court. We agree with the opinion of the trial judge that the denial of the action for prohibition against the Board of Elections is not res judicata in the present action for a declaratory judgment. The doctrine of estoppel, applied in State ex rel. Hofstetter vs. Kronk, 20 Ohio State 2d 117, can have no application to the issues in the instant case.

Amended Substitute House Bill 205 is a typical omnibus enactment on the subject of all municipal courts in Ohio and is of considerable length. Revised Code 1901.01 deleted the Piqua Municipal Court but retained the establishment of the Troy Municipal Court. Revised Code 1901.02 provides that the municipal courts established by Revised Code 1901.01 (including that at Troy) shall have jurisdiction within the corporate limits of the city and also have jurisdiction as follows:

The Miami County Municipal Court has jurisdiction within Miami County. The first paragraph recites that the court established in Troy shall be styled and known as the "Miami County Municipal Court."

At this point it appears that the bill creates a Troy Municipal Court *with jurisdiction in that municipality* and it grants county wide jurisdiction to a court which it failed to create in Revised Code 1901.01; that is, the Miami County Municipal Court, which is the name by which the Troy Municipal Court is to be known.

Revised Code 1901.08 deletes the provision for election of one full time judge for the Troy Municipal Court and provides for the election of two full time judges for the Miami County Municipal Court in 1975, one of whom shall serve only until December 31, 1979, at which time another will be elected.

Revised Code 1901.36 provides, among other things, for suitable accommodations for the Miami County Municipal Court. The Miami County Municipal Court is mentioned in Revised Code 1905.01 which provides for a mayor's court whenever the court is not required to set as provided in Revised Code 1901.021. Revised Code 1901.021 requires the judges of the Miami County Municipal Court to sit within the municipal corporations of Troy, Piqua and Tipp City and provides that they may sit in other incorporated areas of Miami County.

Revised Code 5503.04 was amended to require the payment by the Miami County Municipal Court of certain fines to the county rather than the municipal corporation.

Sections 2 through 15 of Amended Substitute House Bill 205 contain a series of transitional provisions. The Bill has an effective date of January 1, 1976. Under Section 5 the salary of any chief justice incumbent on the effective date *shall not be reduced during his term of office*. Similar consideration was not extended to the incumbent judge during his term at Troy.

Section 10 is specifically related to the court at Troy. It provides that the office of the existing full-time municipal judge of the Troy Municipal Court be *abolished by this act*, effective upon the commencement of the term of office of the full time municipal judges who are elected to the Miami County court. Such judges were elected and took office on January 1, 1976, at

which time, according to Section 10, the office of the incumbent was abolished *during his term*. Revised Code 1901.07.

* * * * *

Article IV, Section 15 of the Constitution of Ohio provides:

> Laws may be passed *to increase or diminish* the number of judges of the supreme court, *to increase beyond one or diminish to one* the number of judges of the court of common pleas in any county, *and to establish other courts*, . . .; but *no such change, addition or diminution* shall vacate the office of any judge; . . .

Prior to 1912 this section referred to districts of the court of common pleas and the statement as to other courts read "*or* establish other courts." The three alternatives expressed are now in the conjunctive.

In 1857 the question of the power of the legislature to abolish a judicial office during the term of an incumbent came before the court in State ex rel. Flinn vs. Auditor of State, 7 Ohio State 333. In 1852 the legislature created a criminal court of Hamilton county to which relator was elected. Two years later this court was abolished and its business transferred to the Court of Common Pleas. The relator sought his salary for the balance of his term. The Supreme Court held that the language, "*but no such change, addition, or diminution, shall vacate the office of any judge,*" applied to the references to the Supreme Court and the Court of Common Pleas and that such language had no reference whatever to "other courts" which the legislature may establish. The opinion distinguishes between constitutional judges and statutory judges. Only one judge of the Court of Common Pleas may be recognized as a constitutional judge. Who that one

judge may be today in a given multiple judge county after repeated changes in election laws is a matter of considerable conjective. In any event this decision of the Supreme Court in 1857 held that there is no limit upon the power of the legislature to abolish courts and judgeships it creates and that the legislature is not denied the power to do so during the term of an incumbent. The power to abolish, said the court, is as unlimited as the power to create either other courts or additional judgeships on constitution courts.

The rationale of the *Flinn* case has not been reversed even though its logic is questionable and its conclusion open to expressed doubts. Rhetorically, the application of the words, "no *such* change, addition or dimunition," to some but not ail of the preceding conditions appears to be one of personal choice not supported by either the rules of grammar or by the purpose of the entire section. The *Flinn* case limits this protective clause to the then existing number of supreme court judges and to one common pleas judge in any county. While it is the writer's opinion that this construction of the independent clause in the sentence represents an indiscriminate selection of equal alternatives, now set forth in the conjunctive, and represents an unjustified limitation upon otherwise broad constitutional language, the *Flinn* case is the law of this State and it has not been reversed.

The subject of abolition of judgeships appears again in State ex rel. Gustafson vs. Krause, 5 OO 436 (1936), affirmed in 131 Ohio State 97, 5 OO 442. This case involved the Court of Common Pleas and the issues arose when the legislature converted the election of the judges in Cuyahoga County from a group race in which all participated to single and separate races for each office to be filled. Thus all but one office to be filled

were of a statutory and not constitutional origin. The appellate court said that the legislature had the power to diminish and abolish the continuity of office, provided such abolishment did not vacate the office of an incumbent judge. (p. 439). No mention is made of the *Flinn case*. On appeal Chief Justice Weygandt wrote the opinion and on the subject of interrupted terms he had this to say:

> It is urged further that the Constitution permits no legislative interference with the length of term. *This is of course true;* and under each theory each incumbent will be allowed to serve the entire term for which he was elected. p. 101. (Italics ours)

While it may be argued that *Gustafson* reversed *Flinn* there was no interruption of any existing term in that case. The voluntary comments of the appellate court and of the Chief Justice reflect the opinion of the authors, but do not change the case law of Ohio.

Certainly there can be no incumbent without an office, but this general statement, however true, begs the question under Article IV, Section 15, whether the legislature may at will *vacate the office of any* statutory judge by creating another one, in this case, identical in length to the unexpired term of the incumbent. If this be so, there is no limit to legislative control over a majority of the members of the judiciary in the State by the use of any subterfuge that avoids removal by impeachment under Article IV, Section 17.

It is worthy of note that Article IV, Section 23, which provides for consolidation of courts in less populous counties by public vote provides that such consolidation "shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected." In this section the power to

remove a judge without cause during his term is not reserved to the people. Section 23 has no application to the instant case; however, it represents the same policy expressed in Article IV, Section 15. Similarly, Article IV, Section 6, prohibiting reduction in salary during the term has no application here.

Despite the round about method by which the Miami County Municipal Court was created, the legislative intent to abolish the office of the existing judge of the Troy Municipal Court is expressly stated in Section 10 of Amended Substitute House Bill 205.

While I personally agree that Article IV, Section 15, is "clear, concise and positive" in prohibiting the vacation of the office of *any* judge during his term as indicated in the unreported cases of Niehaus, Conners and Utz vs. Morr, No. 235748, 236430 and 236441 in the Court of Common Pleas of Hamilton County and as suggested in State ex rel. Gibson vs. Friedley, 34 NE 872 (Ind.), the Supreme Court of Ohio has not modified its position taken in 1857 in State ex rel. Flinn vs. Auditor, 7 Ohio State 333 (334) that the legislature has unbridled power to abolish a statutory judicial office during the term of an incumbent elected judge. *Any change in that constitutional interpretation must be made by the Supreme Court of Ohio.*

The judgment of the trial court will be affirmed.

KERNS, P.J., and SHERER, J., concur.

APPENDIX C

OPINION OF COMMON PLEAS COURT OF MIAMI COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
MIAMI COUNTY, OHIO

GENERAL DIVISION

BRUCE GEISINGER,
Plaintiff,

vs.

KENNETH COOK, ET AL,
Defendants.

Case No. 75-319

Findings of Fact, Conclusions of Law, Memorandum of Decision and Journal Entry of Judgment

Plaintiff in this case filed a complaint for declaratory judgment and injunction. The Defendants filed answers, and the pleadings were completed. By stipulation the matter was submitted to the Court for determination on the merits, and Counsel for each side filed briefs.

The matter was taken under advisement by the Court.

Upon consideration of all matters in the case, the Court makes the following determinations.

FINDINGS OF FACT

1. Defendants Kenneth Cook, Robert Clawson and John Knoop are all the members of the Board of County Commissioners of Miami County, Ohio.
2. Defendant Dale Davis is the Treasurer of Miami County, Ohio, and Defendant Jerry L. Brown is the Auditor of Miami County, Ohio.

3. Defendants Donald Bercaw, Cletus Berning, Durward Winfield and George R. Mote are all members of the Board of Elections of Miami County, Ohio.
4. Defendant Ted W. Brown is the Secretary of State of Ohio, and, in such capacity, is the chief election officer of the State of Ohio.
5. Defendant William J. Brown is the Attorney General of Ohio, and, in such capacity, is the chief law officer of the State of Ohio, and is made a party Defendant herein pursuant to the provisions of Section 2721.12 of the Revised Code of Ohio.
6. Plaintiff Bruce Geisinger was the duly elected, qualified and acting as Judge of the Troy Municipal Court, having been elected for a full term of six years commencing January 1, 1974.
7. The 11th General Assembly has enacted, and, on August 19, 1975, the Governor of the State of Ohio approved, a certain Bill designated Sub. H. B. No. 205. Said legislative enactment amends certain enumerated sections of the Revised Code of Ohio relative to judicial salaries, the creation of new municipal courts and judgeships, the abolition of the office of chief justice of a municipal court, conforming the Revised Code to the Rules of Civil Procedure, the abolition of police courts, the elimination of obsolete language, and declares an emergency.
8. On November 4, 1975, Defendant Board of Elections caused the election of two judges for the Miami County Municipal Court in accordance with said legislative enactment.
9. On September 2, 1975, Plaintiff Bruce Geisinger

filed in the Supreme Court of Ohio a complaint for a writ of prohibition against the Board of Elections of Miami County, Ohio, William J. Brown, Attorney General of the State of Ohio, and Ted W. Brown, Secretary of State of the State of Ohio, said case being numbered 75-771. In that cause the plaintiff as Relator, prayed for a writ of prohibition restraining Defendant-Respondents from causing the election of two full-time judges to said Municipal Court and from divesting Plaintiff-Relator from his office as judge of the Troy Municipal Court.

10. Said cause was dismissed by the Supreme Court, sua sponte, and without opinion on September 26, 1975.
11. The denial of the writ of prohibition by the Ohio Supreme Court is not a res judicata finding as concerns the present case, because it was not a determination on the merits.
12. Municipal Courts are "statutory courts" as opposed to "constitutional courts."
13. County courts are "statutory courts" as opposed to "constitutional courts."
14. Municipal court judges and county court judges are holders of "statutory offices."
15. Former Section 1901.01 of the Ohio Revised Code established a municipal court in Piqua, and a municipal court in Troy.
16. The present Section 1901.01 deleted the Piqua Municipal Court and retained the language about the Troy Municipal Court.
17. Individual county courts are not named specifically in Section 1907.011 of the Revised Code, but it is stated that there is a county court in

each county where the municipal court does not have jurisdiction over the entire county.

18. Former Section 1901.02 said that municipal court jurisdiction was to be in the municipal corporation plus in the case of the Troy Municipal Court, certain listed townships would be involved, and in the case of Piqua Municipal Court, certain other listed townships would be involved.
19. The present Section 1901.02 provides in pertinent part: "The municipal courts, established by Section 1901.01 of the Revised Code, have jurisdiction within the corporate limits of their respective municipal corporations and are courts of record. Each of such courts shall be styled " municipal court," inserting the name of the municipal corporation, except . . . and the municipal court established in Troy, which shall be styled and known as the "Miami County Municipal Court. . ."

    "The Miami County Municipal Court has jurisdiction within Miami County. . ."
20. County court cases were transferred by Section 1901.04 to new municipal court.
21. Section 1901.05 was enacted as a general provision which designated that each municipal court shall have one judge per 100,000 population.
22. Former Section 1901.08 provided that the Piqua Municipal Court would have one full time judge elected in 1953, and the Troy Municipal Court would have one full time judge elected in 1955.
23. The last paragraph of Former Section 1901.08 of the Ohio Revised Code reads: "Changes in this section shall not affect the existence or term of the office of a judge elected pursuant to Section

1901.05 of the Revised Code, whether or not such judgeship is reflected in this section."

24. Present Section 1901.08 provides that the Miami County Municipal Court shall have one full time judge elected in 1975, and another full time judge elected in 1975 and serving until December 31, 1979, at which time another full time judge will be elected.
25. The last paragraph of present Section 1901.08 reads: "Changes in this section shall not affect the existence or term of the office of a judge elected pursuant to Section 1901.05 of the Revised Code, solely because such judgeship is not reflected in later amendments of this Section."
26. By Legislative action the Ohio legislature has abolished the Troy Municipal Court and the Piqua Municipal Court and has established a Miami County Municipal Court.
27. Present Section 1901.021 of the Ohio Revised Code reads in pertinent part as follows: "Notwithstanding any other provision of this Chapter, the judge or judges of any municipal court having territorial jurisdiction outside the corporate limits of its municipal corporation, may sit outside the corporate limits of the municipal corporation within the area of its territorial jurisdiction. . .

    At least one of the judges of the Miami County Municipal Court shall sit within the municipal corporations of Troy, Piqua, and Tipp City, and the judges may sit in other incorporated areas of Miami County . . ."

CONCLUSIONS OF LAW

1. The Supreme Court's denial of the writ of prohibition in case #75-771 is not a decision on the merits which allows the doctrine of res judicata to be successfully asserted in the present case.
2. The General Assembly has abolished the Troy Municipal Court and has abolished the Piqua Municipal Court, and has abolished the Tipp City County Court and has created the Miami County Municipal Court.
3. The Constitution does not prohibit this action by the legislature.
4. The Constitution does not prohibit the vacation of the office of Troy Municipal Judge Geisinger in this particular case.
5. The general statutory Section (1901.05) establishing a population limit formula for judges must give way to the specific statutory section (R.C. 1901.08) which provides for a specific number of judges in Miami County.

MEMORANDUM OF DECISION AND JOURNAL ENTRY OF JUDGMENT

Because of the findings in this case and the conclusions in this case, the Court denies the Plaintiff's request to find Substitute House Bill #205 to be unconstitutional and void as applied to Miami County.

The Court further determines that Plaintiff is not entitled to continue in office as judge of any court until expiration of the term to which he had previously been elected as judge of the Troy Municipal Court. The Court denies Plaintiff's claims for relief of injunction in validation of the election of Miami County Municipal Court Judges.

The Court denies the claim of the Defendants that the prohibition case #75-771 in the Ohio Supreme Court is res judicata as applied to this case.

Plaintiff shall pay costs of this proceeding.

On the 24th day of May 1976, the original of this journal entry is being mailed to the Office of Judge R. K. Wilson in Troy, for filing upon receipt. On the same date a copy of this findings of fact, conclusions of law, memorandum of decision and journal entry of judgment is being mailed to John E. Fulker, Attorney for Plaintiff; Frank S. Virzi, Attorney for Defendants; and Thomas E. Martin, Assistant Attorney General, Attorney for Defendants Ted W. Brown and William J. Brown.

The Court sets forth this document after a review of Rule 52 of the Ohio Rules of Civil Procedure in the hope that such rule will be satisfied by this document. The Court considers this judgment to be effective for all purposes as of the date filed. The copies mailed to counsel are mailed by ordinary U. S. mail from the office of Judge Wilson in Urbana.

/s/ ROGER B. WILSON
Judge Sitting By Assignment

Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

Case No. 77-985

BRUCE GEISINGER,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF MIAMI COUNTY, OHIO, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the federal Constitution restricts the legislative power of a state to create and abolish its public offices.

II. Whether the failure to raise a federal claim in the appellate courts constitutes a waiver of such claim.

In The

Supreme Court of the United States

October Term, 1977

Case No. 77-985

BRUCE GEISINGER,

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v.

BOARD OF COUNTY COMMISSIONERS
OF MIAMI COUNTY, OHIO, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT

Petitioner was elected to the office of judge of the Troy Municipal Court for a full term of six years commencing January 1, 1974.

The following year the General Assembly of Ohio enacted Amended Substitute House Bill No. 205 which amended certain statutes relating to municipal courts. As pertinent to this litigation the Bill created the Miami County Municipal Court, whose territorial jurisdiction included the City of Troy; provided for the election of two full-time judges to that court at the general election of 1975; and provided for the abolishment of the office of the judge of the Troy Municipal Court effective upon the commencement of the terms of office of the judges of the Miami County Municipal Court.

Petitioner, on August 25, 1975, instituted an original action in the Supreme Court of Ohio seeking a writ of prohibition to restrain the election of the judges of the

Miami County Municipal Court. The Supreme Court dismissed the action.

On November 4, 1975, two judges were elected to the Miami County Municipal Court. They commenced their terms of office on January 1, 1976.

Petitioner instituted this litigation in the Court of Common Pleas of Miami County. He requested a declaratory judgment that the portions of Amended Substitute House Bill No. 205, which provided for the abolishment of his office and the election of the new judges, were unconstitutional. The court held that the General Assembly had abolished the Troy Municipal Court and that nothing in the Constitution prohibited it from doing so.

The judgment of the Court of Common Pleas was affirmed by the Court of Appeals and the Supreme Court.

ARGUMENT

There Is No Important Question Of Federal Law.

Petitioner claims that the abolishment of his office prior to the expiration of the term for which he was elected violates rights guaranteed him by the Constitution of the United States. This claim is foreclosed by numerous decisions of this Court. The power to create an office and the power to abolish it are co-extensive. The legislature may abolish any office which it has created. It may do so at any time it chooses, either during or at the end of the term of the incumbent. Nothing in the federal Constitution restricts this power.

> The legislative power of a state, except insofar as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Newton* v. *Commrs. of Mahoning County*, 10 Otto. (100 U.S.) 548, 558 (1880).

See also Higgenbotham v. *City of Baton Rouge*, 306 U.S. 535, 538 (1939); *Dodge* v. *Bd. of Educ.*, 302 U.S. 74, 78 (1937); *Kingston* v. *McLaughlin*, 359 F.Supp. 25, 28-29 (D. Mass. 1972), *aff'd*, 441 U.S. 923 (1973).

Petitioner is unable to establish any property interest in his office. The Constitution does not create such interests. They are created and their limits defined by state law. *Bd. of Regents* v. *Roth*, 408 U.S. 564, 578 (1972).

The Supreme Court of Ohio has repeatedly held that an officeholder has no vested interest or property right in his office. Paragraph 3 of the syllabus of *Fuldauer* v. *Cleveland*, 32 Ohio St.2d 114 (1972); paragraph 1 of the syllabus of *State ex rel. Trago* v. *Evans*, 166 Ohio St. 269 (1956); paragraph 1 of the syllabus of *State ex rel. Gordon* v. *Barthalow*, 150 Ohio St. 499 (1948); paragraph 1 of the syllabus of *Elyria* v. *Vandemark*, 100 Ohio St. 365 (1919).

Petitioner claims that his reliance on the "assurances afforded by the statute and organic law of the State of Ohio" is sufficient to create a property interest in his office. In light of the repeated determinations of the Supreme Court of Ohio, cited above, such reliance cannot be considered reasonable.

For purposes of equal protection analysis legislation affecting public employment is judged under the rational basis standard. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313-314 (1976). The legislation involved herein satisfies this standard. The legislative determination that the interests of justice might better be served by a municipal court with county wide jurisdiction rather than a court with more limited jurisdiction, cannot be characterized as wholly arbitrary or capricious. It, therefore, complies with the requirements of the equal protection clause. *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U.S. 1, 40 (1973) (Stewart, J., concurring).